Supreme Court, U. S.
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MAY 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1430

GLORIA SANDQUIST,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1974

No. _____

GLORIA SANDQUIST,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To: The Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks the issuance of a Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of

Los Angeles, affirming the judgment of the Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California, convicting petitioner of a various violations of California Penal Code §311.2 (exhibiting obscene motion pictures) and thereafter, on February 14, 1975, denying petitioner's application for a rehearing after the said judgment was affirmed on appeal and further denying petitioner's application for certification of the cause to the Court of Appeal of the State of California. There was no written opinion either in the trial Court or in the reviewing Court. (See Appendix for copy of order denying rehearing and denying certification.)

This Court has jurisdiction to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles under 28 U.S.C.A. §1257(3).

QUESTIONS PRESENTED

1. Does California Penal Code §311.2, the statute under which petitioner was convicted, meet the requirements of specificity established by California v. Miller as a prerequisite for the exercise of State power to restrict exhibition of motion pictures to consenting adults who pay an admissions price to see the exhibition?

2. Do constitutional policies disfavoring ex post facto criminal punishment prevent the California Appellate Courts from so reconstruing Penal Code §311.2 as to meet the Miller requirements of specificity?

3. Do the First, Fourth and Fourteenth Amendments to the United States Constitution deprive the several States of any power to restrict, on the ground of obscenity, exhibition of motion pictures to consenting adults who pay an admission price to see the exhibitions?

4. Where there is a conflict between the trial Judge and the defense attorney as to the events occurring in the

misdemeanor trial and the trial Judge certifies a statement of facts with which the appellant-defendant disagrees, does the Fourteenth Amendment to the United States Constitution require that the appellant-defendant be supplied free of charge with a Reporter's Transcript of the proceedings below for the purposes of this appeal?

5. Is it proper to instruct the jury engaged in deliberating on an obscenity charge that obscenity of the material or conduct involved is to be measured by a "controlling community" defined to be the entire State of California rather than the locality in the State of California in which the alleged crime took place?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution -- Article 1, Section 9, Clause 3:

> "No Bill of Attainder or ex post facto law shall be passed."

United States Constitution -- Article 1, Section 10, Clause 1:

> "No State shall . . . pass any Bill of Attainder, ex post facto law, ..."

United States Constitution -- First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . ."

United States Constitution -- Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation, by particularly describing the places to be searched, and the person or things to be seized."

United States Constitution -- Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States,

and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Constitution -- Article 1, Section 16:

"No Bill of Attainder, ex post facto law or law impairing the obligation of contracts shall ever be passed."

California Penal Code §311:

"Definitions.

"As used in this Chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the

predominant appeal of the matter, taken as a whole, is a prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and this matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Persons' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means being aware of the character or the matter or life conduct."

California Penal Code §311.2:

"Sending or bringing into State for sale or distribution; printing, exhibiting, distributing or possessing within State.

"(a) Every person who knowingly:

"Sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State propose, publishes, prints, exhibits, distributes or offers to distribute, or keeps in his possession with intent to distribute or to exhibit or effort to distribute, any obscene matter, is guilty of a misdemeanor. . . ."

STATEMENT OF THE CASE

Petitioner, Gloria Sandquist, operated a movie theater called the "Kozy Kitten" in Bellflower, California. She was brought to jury trial in the Municipal Court of Los Cerritos Judicial District, County of Los Angeles, State of California on five consolidated cases, namely Actions Nos. M-38945, M-40594, M-41767, M-51531, and M-51883 in said Municipal Court.

On November 15, 1973 she was found guilty of one count in each of said Actions Nos. M-40594, M-41767, M-5153 and M-51883 and five counts in said Action No. M-38945. Each of said counts charged a violation, on a separate occasion, of California Penal Code §311.2, namely exhibition of obscene motion pictures in the Kozy Kitten.

Petitioner was sentenced in said Municipal Court on said convictions on December 14, 1973. In Action No. M-51883 she was granted a three-year summary probation conditioned on closing the Kozy Kitten and paying a fine of $500 or serving 50 days plus a police officer training

assessment of $125 and on the further condition that she spend 45 days in the County Jail. She received identical sentences on each of the other counts, including the five counts in Action No. M-38945 except that she was to serve 90 days in the County Jail. All sentences were consecutive and cumulative. The result was that she was to serve a total of 765 days in the County Jail (well over two years) and to pay fines totaling $5,725 or serve an additional 450 days in the County Jail.

Prior to trial, timely demurrers were interposed in each of said actions attacking the constitutionality of Penal Code §311.2 on the grounds urged herein and said demurrers were overruled.

A timely appeal was taken to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. A certified court reporter had taken down the proceedings during the trial but no transcript thereof was made. The trial Court engrossed a "Statement of Facts on Appeal" to the Appellate Department of the Superior

Court of State of California and said statement differed in material respects from the statement desired by petitioner's attorney. Accordingly, petitioner's attorney made a motion in said Appellate Department of the Superior Court of the State of California for the County of Los Angeles that a free Reporter's Transcript of the proceedings in the trial be supplied for the purposes of appeal. This motion was denied and the appeal was decided on the basis of the engrossed Statement of Facts on Appeal.

The judgment of the trial Court was affirmed without an opinion and petitioner thereafter timely applied for certification to the California Court of Appeal pursuant to Rule 63(b) and in the alternative applied for a rehearing and requested that the decision be delayed until this Honorable Court ruled upon the case of Miranda v. Hicks (the case in the United States District Court, Central District of California wherein a three-judge Court held that California Penal Code §311.2 was obnoxious to the First and Fourteenth Amendment to the United

States Constitution and therefor unconstitutional, this Honorable Court having granted a hearing thereon and presently said case being under review by this Honorable Court). These petitions were denied on February 14, 1975.

Thereafter, upon application by petitioner, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States, made an order on March 25, 1975 to grant the remittitur to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles Case Nos. CR A 12422, CR A 12423, CR A 12424, CR A 12425, and CR A 12426 (the numbers given to said Municipal Court cases in the said Appellate Department) be stayed pending further consideration of the application. On April 9, 1975, said order was continued pending the timely filing and disposition of a Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

On its Face, California Penal Code §311.2 (the Statute Under Which Petitioner Was Convicted) Does Not Meet the Miller Requirement of Specifically Defining Prohibited Depiction of Sexual Misconduct and is Therefore in Conflict With Due Process Requirements of Certainty and Unconstitutional

Miller v. California, 413 U.S. 15, was an effort of the United States Supreme Court to finally and definitively settle the question of permissive state regulation of alleged pornography and sexual obscenity.

In Miller, the rule enunciated by Chief Justice Burger and agreed to by five Justices of the United States Supreme Court is that:

> ". . . we acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene material must be carefully limited . . . (Citations) . . . . As a result, we

now can confine the permissible scope of such regulation to works which depict the described sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in the patently offensive way, and which, taken as a whole do not have serious literary, artistic, political or scientific value.

"The basic guidelines for the trier of fact must be:

"(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (Citations) . . . .

"(b) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable

State law.

"(c) Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. We do not adopt to the Constitutional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts, supra, 338 U.S. F. 419 . . . ." (37 L.Ed.2d 430 - 431 emphasis added.)

Examples of what a State statute could define for regulation under (b) of the above tests, are given for Miller as follows:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (37 L.Ed.2d 431).

The importance of a State's specific definition of "hard core" sexual conduct

to be proscribed is emphasized as follows:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by regulating State law as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (37 L.Ed.2d 432-433, emphasis added).

California Penal Code §311.2 prohibits exhibition of "obscene" matter and "obscene" matter is defined in Penal Code §311(a).

The vice of these Penal Code sections with relation to the Miller requirements is that they embody only two of the three basic elements therein set forth, omitting the element that the proscribed conduct must be specifically defined.

Obviously, the indicated Penal Code sections were designed to meet the test of Memoirs v. Massachusetts, 383 U.S. 413. The Memoirs test is now recognized by all members of the United States Supreme Court to be unworkable; and has been abandoned (37 L.Ed.2d 430).

> But the Miller test changes the Memoirs test: It makes it more stringent by requiring that the proscribed "obscenity" be specifically defined; and it removes the requirement that the context of the alleged "obscenity" be utterly without redeeming social value.

Clearly the California Legislature could not anticipate the Miller test and there seems no question that the specificity required by the Miller test is not present under the California statute in question. The specific act of sexual conduct that the Legislature does not want to be exhibited in motion pictures is not set forth in the California statute. All that is set forth is the broad generalization of Memoirs.

In People v. McCaughan, 49 Cal.2d 409, the California Supreme Court states:

> "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application violates the first essential of due process of law."

Patently the California State Law designed to embody the Constitutional requirement of Memoirs, that the Justices of the United States Supreme Court now find to be too opaque to be workable, can be no less opaque and hence must be too vague to meet the requirements of due process.

In Miranda v. Hicks, in a memorandum opinion filed by a three-judge Court, in the United States District Court Central District of California, in Case Number Civil 73-2775-F, it was held, that Penal Code §311.2 is unconstitutional in accordance with an analysis similar to the above. The United States Supreme Court

has, since the date of that opinion, which was June 4, 1974, granted a Petition for a Writ of Certiorari and the case is presently under consideration.

In view of the foregoing considerations, it appears plain that the ruling in Miranda v. Hicks, supra, is correct and that Penal Code §311.2 is unconstitutional because of vagueness.

II

Efforts by the California Appellate Courts to So Reconstrue Penal Code §311.2 as to Meet the Miller Requirement of Certainty is Unconstitutional Because Such Action Violates the Spirit, if Not the Letter, of Constitutional Policies Prohibiting Ex Post Facto Criminal Punishment

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United States Constitution, Article I, Sections 9 and 10 and California Constitution, Article I, Section 16 express a constitutional policy against retroactive substantive effect being given to Penal Law. Plainly the due process clause of the Fourteenth Amendment to the United States Constitution prevents evasion of this policy by a state Appellate Court

changing the interpretation of a criminal statute and giving the change a retroactive effect.

Clearly, prior to Miller, the California Appellate Courts have had no reason to interpret California Penal Code §311.2 so as to give it the specificity required by Miller. As previously discussed, this statute was designed to meet the Memoirs test and there was no occassion for the Appellate Courts of California to go any further than to say that it had met such test. Manifestly, there was no reason to attempt any further clarification that would meet the requirements of Miller because Miller has no precursors. Whether or not, §311.2 can be a given prosecutive effect by reinterpretation is another problem. In passing, it would seem that it could not because the Legislature and not the Courts writs our laws. Obviously the Legislature could not anticipate the Miller test of specificity and it is the Legislature and not the Courts who should determine what is obscene in California, so long as constitutional standards are met.

It would seem manifest that, consistent with due process, an individual should not be expected to know the criminal law concerning obscenity if the United States Supreme Court does not know that law or if the California Supreme Court does not know that law.

Thus, when the United States Supreme Court, after over a decade of struggling with what is proper State action in regard to obscenity, finally takes a definitive and clear stand, abandoning earlier notions of what the Constitution requires and substituting in its place what are hoped to be better and more accurate interpretations of the Constitution, the effect is to present a clear guideline for the future action of the individual. Obviously, however, the individual could not know before such new interpretation that it would be made and it is unrealistic and hypocritical to expect that he would. A fortiorari, the individual could not be expected to know what the California Appellate Courts might believe was intended by the Legislature in view of the new Miller rule.

Miller v. Harris, 347 U.S. 612, 617 -- Holding that no man should be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Since the California statutes do not on their face meet the requirements of Miller, any interpretation of those statutes to conform to Miller must be prospective in application only or else run afoul of the constitutional policies against retroactive sanctions. Obviously, such changes in law by Court decision have the thrust of statutory changes.

III

The First, Fourth and Fourteenth Amendments to the United States Constitution Deprive the Several States of Any Power to Restrict, on the Ground of Obscenity, Exhibition of Motion Pictures to Consenting Adults Who Pay an Admission Price to See the Exhibition; and therefore the Statute Under Which Petitioner Was Convicted is Unconstitutional

As this petition for a Writ of Certiorari is being written, the case of Hicks

v. Miranda is pending in the United States Supreme Court, after a finding by a three-judge court in the United States District Court for the Central District of California that California Penal Code §311.2 is unconstitutional; in Hicks v. Miranda, certiorari has been granted. The three-judge court was made up by the Honorable Walter Ely, Circuit Judge of the United States Court of Appeals, Ninth Circuit; the Honorable William C. East, Senior Judge of the Oregon District Court; Honorable Warren J. Ferguson, California Central District.

At least one theory of the attack of that case on the constitutionality of California Penal Code §311.2 is that the First and Fourth Amendments, through the Fourteenth Amendment, of the United States Constitution, deprives the several States of any power to restrict, on the ground of obscenity, exhibition of motion pictures to consenting adults who pay an admission price to see the exhibition.

The point is that the depiction of sexual acts, no matter how unconventional or objectionable to general standards in

the community, still represents the depiction of ideas of behavior of human beings. The First Amendment tells us that, within reason, the State may not interfere in dissemination of ideas. The Fourth Amendment tells us that an activity done in privacy cannot be interfered with by the State unless there is probable cause to believe there is violation of a valid criminal statute.

Accordingly, an adult who knowingly pays money to enter a theater in order to see a film is paying for privacy to consider ideas. The State can have no legitimate interest in interfering with such activity which is plainly a right protected by the First and Fourth Amendments to the United States Constitution through the Fourteenth Amendment.

Obviously, due process requires that if the individual cannot be molested in paying for the privilege of viewing or conserving ideas in a private place, the person supplying the place and the ideas for consideration cannot be interfered with either. Otherwise the right first considered would become meaningless.

It follows that Miller, supra, must be restricted to its facts and cannot be applied to the censorship of motion pictures to be shown in a private place to consenting adults, knowing what they are going to see, and paying a price.

IV

Since There Was a Conflict Between the Trial Judge and the Defense Attorney as to the Proper Content of the Settled Statement Certified to the Appellate Court by the Trial Judge, it Was Reversible Error to Deny Petitioner's Motion For the Preparation, Without Cost to Petitioner, of a Reporter's Transcript of the Trial Court Proceedings For the Purposes of Appellate Review

It is now settled that as a matter of due process a State Court must supply a Reporter's Transcript of the trial proceedings to a convicted defendant in a felony case for the purposes of appeal.

In the case at hand, petitioner demanded such a transcript but the Court refused to order it. Plainly, the aggregate consequences of her sentence are the same as though she had been convicted of

a felony.

Failure to provide petitioner with a transcript is especially important to this case because of the discrepancy between the facts of trial as remembered by the trial Court and as remembered by the defense counsel. Fundamental fairness is a prerequisite of due process (See Gagnon v. Scarpelli, 41 U.S. Law Week 45, ___ U.S. ___). It is manifestly unfair for the trial Judge to establish a record for appeal that is contrary to the record that the appellant's attorney in fact believes should exist. The Reporter's Transcript would solve the problem.

It follows that it was a violation of the due process clause of the Fourteenth Amendment to the United States Constitution for the State Courts to deny petitioner a free transcript of the proceedings during trial for the purposes of appeal and to settle the differences between the trial Judge and the petitioner's attorney as to what transpired during such proceedings.

V

The Judgment Should be Reversed Because the Jury Instructions Measured Obscenity by a "Controlling Community" Defined to be the Entire State of California

Jury instructions state in part "for the purposes of determining the obscenity of the material here in question, the controlling community is the entire State of California . . . the standard of any such local community may not be taken in and of itself, to establish the state-wide standard, though it may be considered as some evidence of what the state-wide standard is."

This is directly contrary to the requirements of the constitution as delineated in Miller v. California, 413 U.S. 15.

It is there expressly held that the controlling community is the local community where the purported pornography is found.

In the case at hand, the prosecution presented the testimony of an expert who based his opinion upon state-wide

experience to the effect that the pictures in question were obscene. And that each of them taken as a whole and applying the standards of the entire community of the State predominantly appeal to the prurient interest of the average adult person, went substantially beyond the customary limits of candor in the State of California and were utterly without redeeming social importance. The substance of this testimony appears in the engrossed statement at page 6, lines 15-22.

On the other hand, numerous defense exhibits forming part of the record show the local community standards, i.e., the standards of the community where the alleged obscene pictures were shown, are very broad indeed and undoubtedly will include the films in issue within their purview as not being objectionable.

It follows that the jury might have believed that according to local community standards the films were not obscene but that according to state-wide community standards the films were obscene and that, therefore, they found petitioner guilty by reason of this erroneous jury

instruction erroneous in view of Miller.

It follows that the erroneous jury instruction was the cause of reversible error.

CONCLUSION

For the reasons outlined above the Writ of Certiorari should be granted.

Respectfully submitted,

IRVING A. KANAREK

Attorney for Petitioner

APPENDIX

FILED
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Clarence E. Cabell
County Clerk
L. Swart, Deputy

APPELLATE DEPARTMENT OF THE
SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GLORIA SANDQUIST,
Defendant and Appellant.

Superior Court No. CR A 12422
Municipal Court of the Los Cerritos
Judicial District No. M-38945

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

GLORIA SANDQUIST,
Defendant and Appellant.

Superior Court No. CR A 12423
Municipal Couft of the Los Cerritos
Judicial District No. M-40594

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GLORIA SANDQUIST,

Defendant and Appellant.

Superior Court No. CR A 12424
Municipal Court of the Los Cerritos
Judicial District No. M-41767

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GLORIA BELIA SANDQUIST,

Defendant and Appellant.

Superior Court No. CR A 12425
Municipal Court of the Los Cerritos
Judicial District No. M-51531

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

GLORIA BELIA SANDQUIST,

Defendant and Appellant.

Superior Court No. CR A 12426
Municipal Court of the Los Cerritos
Judicial District No. M-51883

ORDER DENYING REHEARING AND
DENYING CERTIFICATION

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal in the above-entitled cases having been filed and having been duly considered,

Said petitions are hereby denied.

Marshall

Acting Presiding Judge

Alarkon

Judge

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

GLORIA SANDQUIST,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Jan 27 1975
Clarence E. Cabell
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L. Swart, Deputy

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No.CR A 12422 Trial Court No. M-38945

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GLORIA SANDQUIST, Defendant and Appellant.	ON APPEAL from the MUNICIPAL COURT of Los Cerritos Judicial District, County of Los Angeles, State of California. John Landis, Judge (311.2 PC)

This cause having been argued and submitted and fully considered, judgment is, ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

Holmes, Presiding Judge
Marshall, Judge
Alarkon, Judge

B-1.

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Jan 27 1975
Clarence E. Cabell
County Clerk
L. Swart, Deputy

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No.CR A 12423 Trial Court No. M40594

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GLORIA SANDQUIST, Defendant and Appellant.	ON APPEAL from the MUNICIPAL COURT of Los Cerritos Judicial District, County of Los Angeles, State of California. John Landis, Judge (311.2 PC)

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L. Swart, Deputy

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No.CR A 12424 Trial Court No. M-41767

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GLORIA SANDQUIST, Defendant and Appellant.	ON APPEAL from the MUNICIPAL COURT of Los Cerritos, Judicial District, County of Los Angeles, State of California. John Landis, Judge (311.2 PC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

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Holmes, Presiding Judge
Marshall, Judge
Alarkon, Judge

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Clarence E. Cabell
County Clerk
L. Swart, Deputy

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No.CR A 12425 Trial Court No. M-51531

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GLORIA BELIA SANDQUIST, Defendant and Appellant.	ON APPEAL from the MUNICIPAL COURT of Los Cerritos, Judicial District, County of Los Angeles, State of California. John Landis, Judge (311.2 PC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

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Holmes, Presiding Judge
Marshall, Judge
Alarkon, Judge

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County Clerk
L. Swart, Deputy

IN THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No.CR A 12426 Trial Court No. M-51883

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. GLORIA BELIA SANDQUIST, Defendant and Appellant.	ON APPEAL from the MUNICIPAL COURT of Los Cerritos Judicial District, County of Los Angeles, State of California. John Landis, Judge (311.2 PC)

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

Holmes, Presiding Judge
Marshall, Judge
Alarkon, Judge

Supreme Court U. S.
FILED
AUG 14 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-1430

GLORIA SANDQUIST,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The Petition correctly sets forth the orders below and the absence of an opinion therein.

II.

JURISDICTION

The jurisdictional requisites are adequatedly set forth in the Petition.

III.

QUESTIONS PRESENTED

A. DOES THE PETITION PRESENT ANY SUBSTANTIAL FEDERAL QUESTIONS?

B. DO THE CONVICTIONS HEREIN REQUIRE REVERSAL FOR INSUFFICIENT SPECIFICITY IN EITHER THE GOVERNING LAW OR THE JURY INSTRUCTIONS?

1. The Governing Law
2. The Jury Instructions

C. IS THERE ANY "EX POST FACTO" PROBLEM IN THE CASE AT BAR BY VIRTUE OF ALLEGED RETROACTIVE APPLICATION OF MILLER STANDARDS?

1. Was there Retroactive Application?
2. If so, was there "Ex Post Facto" Effect?

D. IS EXHIBITION OF OBSCENITY TO CONSENTING ADULTS CONSTITUTIONALLY PROTECTED?

E. DO THE CONVICTIONS REQUIRE REVERSAL FOR USE OF JURY INSTRUCTIONS DEFINING THE APPLICABLE COMMUNITY AS THE

STATE OF CALIFORNIA?

F. DOES DUE PROCESS MANDATE THAT A MISDEMEANOR DEFENDANT BE GIVEN A FREE TRANSCRIPT REGARDLESS OF LACK OF INDIGENCY OR THE AVAILABILITY OF A SETTLED STATEMENT FAULTED ONLY IN THAT IT DID NOT AGREE WITH THE DEFENSE VERSION?

IV.

STATUTES INVOLVED

The pertinent provisions of the California obscenity statute are set for in the Petition at pp. 6-8.

V.

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the Petition except as to its omission of the following:

"I-THE COURT REPORTER

"At the outset of the trial the court announced that no reporter was assigned to the court, or any division thereof except when preliminary hearings were held. The court further stated to both counsel

that if they desired a Court Reporter they were permitted to employ at their own expense any reporter they wished. Defendant did in fact employ a reporter of his own choosing who was present at all times court was in session.

"Subsequent to the trial, defendant's counsel stated to the court that his client could not advance the estimated $2000 necessary for the transcript. A Motion was made by defendant that the court order the Reporter's Transcript prepared without cost to the appellant. Defendant's counsel stated he could not represent that defendant was indigent. The Court requested defendant to furnish a financial statement, but this was refused. Defendant's counsel informed the court that defendant owned the realty on which the Kozy Kitten was located and that she owned a bar in Downey. The Probation Report showed the defendant stated she had a gross income of $4000 per month. During the trial Mr. Lynch,

a reporter for the Long Beach Press Telegram, testified under oath that he interviewed the defendant and that she stated to him she had a gross income of $100,000 annually with a net of $80,000. This admission was not denied at any time. Defendant did not testify at the trial. The court denied the motion." (Engrossed Statement on Appeal[1], pp. 2-3.)

VI.
ARGUMENT
A.
AS WILL BE MORE PARTICULARLY SHOWN INFRA, THE PETITION DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION

As we will show **infra**, as to each of Petitioner's contentions. This does not appear to be a case "[w]here a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

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1. Hereinafter E.S.S.A.

(See Rule 19(1)(a) Supreme Court Rules) In fact, as to the obscenity issues, the precise contentions raised by Petitioner herein have each been explicity settled to the contrary by this court. Petitioner's remaining contention (that a free transcript is required despite lack of indigency) has been impliedly settled against her in such cases as Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), and Mayer v. Chicago, 404 U.S. 189, 30 L.Ed.2d 372, 92 S.Ct. 410 (1971).

B.

THE CONVICTIONS HEREIN DO NOT REQUIRE REVERSAL FOR INSUFFICIENT SPECIFICITY IN EITHER THE GOVERNING LAW OR THE JURY INSTRUCTIONS

1. The Governing Law

Petitioner's complaint that "the specificity required by the Miller test is not present under the California [obscenity] statute... [Pen. C § 311.2]" (Petition at p. 17) overlooks the fact (as held in People v. Enskat, 33 Cal.App. 3d 900, 908-909,) that pre-existing California decisions (see e.g., Zeitlin v. Arnebergh, 59 Cal.2d 901, 908, 909, 911-

912 (1963); and People v. Noroff, 67 Cal.2d 791, 794 and fn. 6) had already limited California prosecutions to the specific types of material contemplated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Furthermore, this court itself in Miller v. California, 418 U.S. 915, 94 S.Ct. 3206, 41 L.Ed.2d 1158 (1974) (Miller II), dealth with the merits of a similar challenge to the California obscenity statute "by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one" (Hicks v. Miranda, ____ U.S. ____, ____ L.Ed.____, 95 S.Ct. 2281, 2289 (1975)).

In Hamling v. United States, ____ U.S. ____, ____ L.Ed. ____, 94 S.Ct. 2887, 2904-5 (1974) this court replied to a similar challenge to a federal statute by referring to its previous vindication in Roth v. United States, 254 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957), a case which had also upheld the validity of the less precise predecessor to California Penal Code § 311.2 (Roth, supra, 354 U.S. 476, 492; 1 L.Ed.2d 1498, 1511 (1957)).

As Hamling notes, this Court in Miller I did not intimate that the constitutionality of pre-Miller convictions (such as that at bar) was to be cast in doubt but "Indeed, the contrary is readily apparent from the opinions in those cases" (Hamling, supra, ___ U.S. ___, 94 S.Ct. at 2905)

2. The Jury Instructions

This court stated in Hamling, (supra, ___ U.S. ___, 94 S.Ct. at 2906) that the Miller cases "were intended neither as legislative drafting handbooks or as manuals of jury instructions." and that distributors of clear-cut "hard core" obscenity (as in the case at bar) would have no valid complaint as to the lack of a previous limiting construction (Id.).

Nevertheless, just as the governing law anticipated Miller, so also the jury was instructed in accordance with that law. Instruction No. 22 (based on Caljic [misdemeanor] 16.190) was given as follows:

> "Nudity and obscenity are not synonymous. The display, live or pictorial, of the nude human body, male or female, or both, in

> the absence of depicting any sexual activity, is not legally obscene."

Instruction No. 23 (based on Caljic [misdemanor] 16.191 as modified) was given as follows:

> "Sex and obscenity are not synonymous. The description or portrayal of sexual activity which does not appeal to prurient interest is not legally obscene. On the other hand, the graphic portrayal or description of sexual activity, the predominant appeal of which is to prurient interest, is one of the tests of legal obscenity."

C.

THERE IS NO "EX POST FACTO" PROBLEM IN THE CASE AT BAR

1. No Retroactive Application

Contrary to petitioner's implication, People v. Enskat, 33 Cal.App.3d 900, 908-909, did not provide a "new" construction but held instead that pre-existing California decisions (see e.g., Zeitlin v. Arnebergh, 59 Cal.2d 901, 908, 909, 911-

912 (1963); and People v. Noroff, 67 Cal.2d 791, 794 and fn. 6) had already limited California prosecutions to the specific types of material contemplated in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

2. In Any Case A New Limitation on Prosecution Would Be The Opposite Of An "Ex Post Facto" Evil

Even if this court were to disregard state court determinations as to previous statutory construction with its jurisdiction (as exemplified by Enskat, supra) it would still be open to California courts to now place such a gloss on the statute and apply such construction to the material and conduct at bar. (See Dombrowski v. Pfister, 380 U.S. 479, 491, n. 7, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22, 31 (1965) [a First Amendment case], Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) [a First Amendment case], United States v. Thirty-Seven Photographs, 402 U.S. 363, 374, n.3, 91 S.Ct. 1400, 1406, 28 L.Ed.2d 822, 833 (1971) [an obscenity case].). Although such retroactive application

is impermissible where an act is made punishable by means of an unforeseeable judicial enlargment of a pre-existing statute (Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894), we have here a narrowing of the statute by constitutional limitation. Thus it would seem that petitioner lacks standing to complain since any retroactive effect as to specificity would be beneficial to her and no different as to the social value test (Because she still has the advantage of the California statute's facially more stringent requirement). In any case, one whose conduct is "hard core" lacks standing to complain of retroactive application of a new judicial construction. (Dombrowski, supra, 380 U.S. 479, 491; Broadrick v. Oklahoma, supra, 413 U.S. 601).

An "ex post facto" contention similar to that of appellant herein was rejected by this Court in Hamling v. United States, supra, at 94 S.Ct. 2906-2907, noting that Miller's enumeration of specific categories of material which might be found obscene "did not purport to make criminal... conduct which had not previously been thought criminal", but "instead added a 'clarifying

gloss' to the prior construction", making its meaning more definite. (Hamling, supra, ____ U.S. at ____, 94 S.Ct. at 2907.)

D.

EXHIBITION OF OBSCENITY TO CONSENTING ADULTS IS NOT CONSTITUTIONALLY PROTECTED

Petitioner's "consenting adults" immunity contention was already thoroughly demolished in Miller's companion case, Paris Adult Theatre I v. Slaton, 413 U.S. 49; 93 S.Ct. 2628; 37 L.Ed.2d 446 (1973) at 93 S.Ct. 2641.

E.

THE CONVICTIONS DO NOT REQUIRE REVERSAL FOR USE OF JURY INSTRUCTIONS DEFINING THE APPLICABLE COMMUNITY AS THE STATE OF CALIFORNIA

Petitioner's contention to the contrary notwithstanding, in rejecting the view that the First and Fourteenth Amendments require nationwide standards of what is obscene, this Court

"did not require as a constitutional matter the substitution

of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24, 93 S.Ct., at 2615. When this approach is coupled with the reaffirmation in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2634, 37 L.Ed.2d 446 (1973), of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from Miller becomes clear. A juror is entitled to draw on this own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. Stone v. New York, Chicago & St. Louis R. Co.,

344 U.S. 407, 409, 73 S.Ct. 358, 359, 97 L.Ed. 441, 445 (1953); Schulz v. Pennsylvania R. Co., 350 U.S. 523, 525-526, 76 S.Ct. 608, 609-610, 100 L.Ed. 668, 671 (1956). Our holding in Miller that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law." (Hamling, supra, ____ U.S. at ____, 94. S.Ct. at 2901.)

In other words the very "statewide" standard which petitioner asserts to be unconstitutional, was specifically held permissible in Miller and Hamling, (id.).

F.

DUE PROCESS DOES NOT MANDATE THAT A MISDEMEANOR DEFENDANT BE GIVEN A FREE TRANSCRIPT WITHOUT REGARD TO LACK OF INDIGENCY OR THE AVAILABILITY OF A SETTLED STATEMENT

Petitioner is, in effect, asserting the right of a non-indigent to a free

transcript. In Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 100 L.Ed. 891, 898 (1956) this court stated,

> "Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' (citations omitted)"

The evil to be corrected was a system "which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance" (Griffin, supra, 351 U.S. at 18, 100 L.Ed. at 898). Non-indigents, therefore, not being deprived of the means to an adequate appellate reivew have no claim to a free transcript. Since "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all" (Griffin, supra, 351 U.S. at 18, 100 L.Ed. at 898), a non-indigent able but unwilling to pay for his transcript is left by that same Constitution to whatever alternative the state may provide.

Here, despite his client's demand for a free transcript, petitioner's counsel frankly stated that he could not represent that petitioner was indigent. (E.S.S.A., p. 2) Evidently, the only impediment to a transcript was petitioner's unwillingness (but not inability) to pay for it herself. The only fault she finds with the Engrossed Settled Statement is that it "differed in material respects" from her own version (Petition at p. 11)[2/].

In his concurring opinion in Mayer v. Chicago, 404 U.S. 189, 30 L.Ed.2d 372 (1971), Mr. Chief Justice Burger noted the

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2. Following Mayer v. Chicago, 404 U.S. 189 30 L.Ed.2d 372, 92 S.Ct. 410 (1971) California requires free transcripts for misdemeanor defendants upon a prima facie showing of indigency "unless the court has good reason to doubt the truthfulness of the allegations" in which event further deliberation is required. (March v. Municipal Court, 7 Cal.3d 422, 429). However, where a non-indigent (as here) is unwilling to avail himself of a transcript and fails to convince the trial judge that his proposed statement is correct, the finally settled version of the trial judge, who heard and tried the case, must be regarded as final (Burns v. Brown, 27 Cal.2d 631, 636) provided defendant had a chance to present his version and participate in the settlement proceedings (In re Finn, 54 Cal.2d 807, 814-815) apparently not disputed here.

dilatory potential of excessive demands for free transcripts by indigents. How much more applicable is that here where indigency is not even involved. According to the municipal court dockets in one of these matters ligitation commenced in May, 1970 over five years ago, and has not yet been concluded (docket M-38945). Provision of free transcripts to non-indigents could

only unnecessarily increase the burden on the strained criminal justice system as well as the overtaxed public.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. HOWARD
Acting District Attorney
of Los Angeles County

By

ROBERT E. REMER
Special Projects Administrator
Bureau of Special Operations
Member of the Bar of the
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States

HARRY B. SONDHEIM
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Attorneys for Respondent

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

I, the undersigned affiant, hereby declare under oath that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, with principal offices located at 18000 Criminal Courts Building, Los Angeles, California 90012; that the District Attorney is the attorney for the respondent in Gloria Sandquist v. The State of California, No. 74-1430. On August 11, 1975, I served the foregoing BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES on Mr. Irving A. Kanarek, attorney for petitioner in said action, by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail in the City of Los Angeles, California, addressed to his office as follows:

Mr. Irving A. Kanarek, Esq.
14167 Victory Boulevard, Suite One
Van Nuys, California 91404

Three copies were also sent to:

Appellate Department of
the Superior Court
Room 607 Courthouse
Los Angeles, CA 90012

Clerk, Los Cerritos
Municipal Court
10025 East Flower Avenue
Bellflower, CA 90706

Jo Kaufman

Subscribed and sworn to before me this 11th day of August, 1975, at Los Angeles, California.

OFFICIAL SEAL
M. LITENBERG
Notary Public - California
LOS ANGELES COUNTY
My Commission Expires June 23, 1978

M. LITENBERG, notary Public
of the State of California
for the County of Los Angeles